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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS VIDAL,

Defendant and Appellant.

G045952

(Super. Ct. No. 10WF3097)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James S. Odriozola, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Juan Carlos Vidal of two counts of lewd and lascivious acts against a child under the age of 14 (Pen. Code § 288, subd. (a); all statutory citations are to the Penal Code unless otherwise indicated) and one count of lewd and lascivious acts on a child 14 or 15 years of age (§ 288, subd. (c)). The jury also found he committed lewd acts against more than one victim (§§ 667.61, subds. (b) & (e)(5), 1203.066, subd. (a)(7)), and used force during one of the crimes (§ 1203.066, subd. (a)(1)). Vidal contends “generic” testimony presented in support of the lewd acts offense charged in count 2 was insufficient to support the verdict on that count. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL HISTORY

Desiree (born August 1986) testified Vidal, her former stepfather, molested her on multiple occasions. When she was 12 years old and living in Anaheim, Vidal molested her in a hallway while her mother, Dawn, was at work. Vidal grabbed her under her shirt, caressed her chest, and touched and rubbed her vagina under her clothing. When she pushed him away, he angrily shoved her, went into his room and slammed the door. Similar molestations occurred a “few times” while the family lived in Anaheim.

After they moved to Stanton in the summer of 1999, Vidal continued to molest her. He also molested her younger sister Crystal (born August 1988). Most incidents occurred after Vidal began wrestling or “playing around” with the girls. Desiree admitted she would sometimes join in when her stepbrother, Luis, Vidal’s son, initiated wrestling with his father. Vidal grabbed the girls under their shirts and rubbed their private areas. One time Vidal got mad, kicked Crystal in the stomach, walked away, slammed the door, and played his music loudly.

Similar molestations occurred “many times.” Vidal would start off touching Desiree over her shirt, and end up with his hand on her breasts and inside her underpants. He would call Desiree and Crystal “whore, . . . slut,” and say “you’re dirty.” Desiree estimated the abuse “happen[ed] to Crystal” “more than 20 times” between 1999 to 2000, and even more times to her. “It was almost an everyday thing.” Desiree also said Vidal held them down “every single time.”

In June or July 2001, Desiree wrote about an incident in her diary. She “didn’t write specifically what he did to us,” but she documented her feelings about the abuse, “how dirty I felt[,] [¶] . . . [¶] . . . how violated . . . , how mad I was about what was going on and how I couldn’t tell anybody because . . . my mom loved him, and I didn’t want [her] to know how bad a person he really was because I didn’t want to break her heart.”

Vidal continued to molest Desiree during her high school years between 2001 and 2004. Vidal, on at least two occasions, touched the girls on their breasts and vaginas under their bathing suits in the swimming pool. Desiree stayed late at school to avoid Vidal, waiting until her mother arrived home from work. She also spent time with her boyfriend because she felt safer with him.

During a heated argument in January 2004 concerning Desiree’s boyfriend sneaking into her bedroom, Vidal called Desiree a “whore,” and both he and Dawn told her to stop seeing the boyfriend. Desiree angrily responded Vidal should not reprimand her considering “what [Vidal] was doing” to her. She had previously mentioned to her mother that Vidal’s touching made her uncomfortable, but she always “took [the allegations] back because” she knew her mother loved Vidal. This time she detailed the abuse to Dawn.

Dawn ordered Vidal to move out and reported the abuse to the Orange County Sheriff's Department. Ultimately, the girls decided against prosecution because, as Desiree explained it, they feared "being branded [¶] . . . [¶] . . . the girl that got molested by her father" and they wanted a "normal life."

But Desiree and Crystal discussed pursuing the case in the years that followed. In 2010, the girls felt they were strong enough to proceed and decided to come forward again. Desiree also mentioned to a sheriff's investigator, Deputy George Tuttle, that Dawn told her Vidal currently lived with young children, and this factored in her decision. The girls placed separate "covert" calls to Vidal in July and August 2010. Vidal incriminated himself during the recorded calls, which the prosecution played for the jury. Vidal conceded he might have been "a bad person," apologized repeatedly for "misbehaving," and explained he had wanted to be a "cool dad" and a "friend" but was "confus[ed]" because he "didn't know [what his] place" was with the girls and was "confus[ed]" at that point.

Desiree told Deputy Tuttle in 2010 that the molestations occurred "more than once a week," but she was unsure whether Vidal molested her in Anaheim. She did not mention the pool incidents during either her 2004 or 2010 interviews. She mentioned a wrestling incident occurring in the summer of 2001. Luis, who lived with them during the school year in 2002 and 2003, helped the girls avoid Vidal's advances, although she did not mention Luis's involvement to investigators because she "didn't think it was fair for him to go through this." She admittedly withheld information from her mother and the investigators, explaining that these revelations would have been embarrassing. She also conceded she had a bad memory. In 2004, Desiree showed the investigator, Deputy Peter Mach, her diary, and he tore out a page or pages concerning the June 2001 event.

Desiree later threw the diary away because she “didn’t want to have to read it [material about Vidal] again.” After they dropped the case in 2004, she wanted to put “this whole chapter of” her life behind her.

Crystal testified the first incident she recalled occurred in the summer of 2001 when Vidal grabbed and groped her “boobs and . . . vaginal area.” There were at least 20 incidents, but she did not remember all of them. She recalled one incident in the pool where Vidal “tried grabbing [her] butt,” she but did not recall him trying to put his hand inside her bathing suit. She did not remember if Luis was present during the 2001 incident, but she did remember he would help them “wrestle [Vidal] off of” them on other occasions. Vidal threatened to kill the girls and their mother if they revealed the abuse.

Deputy Mach testified he interviewed the girls in January 2004. Desiree told him about two incidents. One occurred in a hallway when they lived in Anaheim between 1997 to 1999. According to Desiree, Vidal grabbed her chest with his left hand, slipped his right hand inside her underwear, and caressed her vagina. When she pushed him away, he became irate and went into his room.

The second incident occurred in the summer of 2001 when Vidal, wrestling with Desiree, placed both hands on Desiree’s breasts and squeezed them. She tried to push him off but he was too strong. After a moment, he moved his right hand to her vagina, beneath her underwear. He caressed her vagina but did not penetrate her. She yelled for help. Crystal was nearby and intervened. When Crystal tried to pull Vidal off Desiree, Vidal sat on Crystal and “proceeded to do the same thing” to her. The girls managed to pull Vidal off Crystal. He became upset, kicked Crystal in the stomach, and retreated to his room. Crystal stated she did not like the way Vidal touched her during

the incident but she could not remember details. She told Vidal to stop or she would tell her mother. Crystal claimed this was the only incident, and both girls said this was the last time Vidal molested them. According to Deputy Mach, Desiree's diary was about half full. The first two pages contained information about the two incidents. The date listed on the first page of the diary was July 2001. Mach removed the pages and booked them into evidence. The prosecution could not locate the diary pages for trial, however.

Vidal testified he began living with Dawn when Desiree was five years old and Crystal was four years old. He eventually married Dawn and became a father figure to the girls. The family moved to Stanton in 1999. Vidal took the girls to school and became very involved in their many activities. When she was 14 years old, Desiree asked if she could date. Vidal and Dawn initially told her she was too young, but ultimately relented, and allowed boys to visit if they were present, but prohibited her from having boys in her bedroom. Desiree disobeyed them and allowed a boy into her bedroom without her parents' knowledge. The issue became contentious and both Dawn and Vidal called Desiree a "“whore,”" which prompted Desiree to throw her diary at Dawn, exclaiming "look what my dad is doing to me[.]" Dawn read the diary and confronted Vidal. He denied the accusations, and told Dawn to call the police.

Vidal never wrestled with the girls until Luis moved into the house in the summer of 2002. Desiree joined in "tag teams" when Luis wrestled with his father. After Luis moved out, Desiree still continued to jump on Vidal and wrestle with him. Crystal was present during some of the wrestling. Vidal conceded he might have made contact with Desiree's breasts over her clothes while wrestling, and he blew air on her stomach "like a fart, what you do to babies." On one occasion, Desiree was biting Vidal's shoulder and he "pulled her pubic hair," which had become exposed after he

pulled on her clothes to make her stop. He denied any sexual intent or purpose, however, and never touched Desiree's breasts or vagina. He was unaware the girls found his wrestling offensive, but later "realized that what [he] did probably was wrong" because Desiree felt bad about it. He stopped wrestling with the girls when they began dating boys and participating in school activities. He acknowledged he did not deny the girls' assertions of abuse during the covert phone calls. He explained, "Because the way they described the wrestling, I thought it might probably happen, but once they start asking other questions about me touching their private parts, I told them I was playing, it wasn't [a sexual] intent of any kind" He told Deputy Tuttle in 2010 he "could have accidentally touched [the girls] inappropriately skin-to-skin[.]" He admitted throwing the girls in the swimming pool, but denied putting his hands under their swimsuits.

Following a trial in June 2011, a jury convicted Vidal as noted above. In October 2011, the trial court imposed a term of 15 years to life for the count 2 lewd act conviction against Desiree, plus a concurrent 15 years to life term for the count 4 lewd act conviction involving Crystal. The court stayed (§ 654) a term for the count 3 lewd act conviction involving Desiree.

II

DISCUSSION

Substantial Evidence Supports the Lewd Act Conviction Charged in Count 2

Count 2 of the information alleged that "[o]n or about and between August 01, 1999 and July 31, 2000, in violation of Section 288[, subdivision] (a)," Vidal unlawfully committed a lewd act against Desiree. The prosecutor argued to the jury count 2 referred to "any one of those incidents that [Desiree] told you about" after the family moved to Stanton and before she turned 14 years old where Vidal "began . . .

wrestl[ing] with her [a]nd during these wrestling incidents he would hold down her arms, . . . he grabbed her breasts and fondled them, and he touched her vagina and massaged it or caressed it or touched it.”

As recounted above, Desiree testified that after they moved to Stanton in the summer of 1999, Vidal molested her “many times” during wrestling incidents by grabbing her under her shirt and rubbing her breasts and vagina. He would start off touching Desiree over her shirt, ending up with his hand on her breasts and inside her underpants. She estimated this happened more than 20 times between 1999 and 2000. It “was almost an everyday thing.”

Vidal complains that on count 2, Desiree “could not recall any specific incident because it was all foggy to her. Because of the generalized nature of her testimony and the fact that this charge was undifferentiated, [Vidal] should have been convicted for engaging in a continuous course of abuse as a resident child molester, pursuant to section 288.5, subdivision (a), instead of being convicted of an individual count of molestation.”

In *People v. Jones* (1990) 51 Cal.3d 294, the California Supreme Court held generic testimony regarding molestations may constitute substantial evidence to sustain a conviction under section 288, subdivision (a): “It must be remembered that even generic testimony (e.g., an act of intercourse ‘once a month for three years’) outlines a series of *specific*, albeit undifferentiated, incidents *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction.” (*Id.* at p. 314.) *Jones* noted “the victim’s failure to specify precise date, time, place or circumstance [does not] render generic testimony insufficient[.]” because “the particular details surrounding a child molestation charge are not elements of the offense and are

unnecessary to sustain a conviction.” (*Id.* at p. 315.) But the court cautioned, “The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., ‘twice a month’ or ‘every time we went camping’). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., ‘the summer before my fourth grade,’ or ‘during each Sunday morning after he came to live with us’), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim’s testimony, but are not essential to sustain a conviction.” (*Id.* at p. 316.)

Desiree’s testimony along with the other evidence in this case satisfied *Jones*’s requirement of sufficient specificity. Desiree testified about the type and number of acts, and general time period in which they occurred. The jury could have reasonably found Vidal committed at least one violation of section 288, subdivision (a), in the period between August 1, 1999 and July 31, 2000. Vidal raises the issue to preserve an argument the California Supreme Court should reconsider *Jones* and adopt the rationale of the dissenter in that case. (See *Jones, supra*, 51 Cal.3d at pp. 323-334 (dis. opn. of Mosk, J.).) As an intermediate appellate court, we are of course bound by the Supreme Court’s holding in *Jones*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.